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IN THE

Supreme Court of the United States

OCTOBER TERM, 1949

NO. 233

THE COLONIAL TRUST COMPANY, of Pittsburgh, Pa., Agent for the Shareholders of the Bank of Pittsburgh National Association, Petitioner,

v.

FIDELITY TRUST COMPANY, Trustee Under the Will of John A. Harper, Deceased, Respondent.

BRIEF FOR RESPONDENT

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BRIEF FOR RESPONDENT

STATEMENT

In the Petition and supporting Brief which have been filed in this case, Counsel for Petitioner treats the case, in his Statement of the matter involved, in his reasons relied on for the allowance of the Writ and in his Argument, as if it were a proceeding between the Respondent, a stockholder of The Bank of Pittsburgh, and the Receiver of that Bank. The case is argued as if it were an attempt on the part of a stockholder to recover back the funds involved in the case from the Receiver at the expense of unpaid depositors and creditors of the insolvent institution.

That is not the case.

It is of vital importance to a clear understanding of the issue involved in the case now before the Court that the proceedings are not between a stockholder of a defunct bank and the Receiver of that bank; that they do not involve a dispute concerning the collection of an assessment levied by the Comptroller of the Currency against a stockholder of the insolvent institution.

Instead, these proceedings constitute a dispute between the Respondent on the one hand, a stockholder who has contributed to a fund now in the hands of the Petitioner as Agent for *all of the stockholders*, and on the other hand, the Petitioner, concerning the distribution of that fund to those who created it. It is, in fact, a dispute between stockholders concerning the distribution of a fund created by them. In such a dispute it has been held that the National Banking Laws constitute the full authority and method for winding up National Banks. Nevertheless, when the creditors have been paid in full, and the fund in the hands of the Receiver has been turned over to an agent for distribution to the shareholders, the subsequent winding up by such shareholders' agent is subject to the equitable powers of the Court. *Spellmire v. Third National Bank of Pittsburgh,* 34 Fed. Supp. 77 (D.C. W. D. Pa. 1940).

The assessment levied by the Comptroller of the Currency against Respondent on November 21, 1931, on account of its ownership of 693 shares of the stock of The Bank of Pittsburgh National Association was $34,650.00 plus interest in the sum of $1,004.85. On that date the assets of the Respondent had a market value of $32,759.12. These securities less a 2% commission to the trustee were distributed by the Orphans' Court of Allegheny County to the Receiver in full settlement

of Respondent's stockholder's liability on the 16th day of May, 1932.

It was not until January 7th, 1935, that the Comptroller of the Currency authorized the Receiver to accept this settlement, and it was not until February 13th, 1935 that the Receiver presented his petition to the District Court of The United States for the Western District of Pennsylvania and obtained authority from that Court to accept those assets from the Respondent. On the day of the District Court's Order the securities had enhanced in value so that they were worth $42,783.35.

Accordingly when the Petitioner, who was acting as agent for the shareholders of the bank received the fund from the Receiver for distribution among the shareholders in accordance with the provision of Section 197 of Title 12 U.S.C.A. that fund was made up in part by the actual realization of $42,783.34, from the assets turned over to the Receiver of the bank by the Respondent in 1932.

Petitioner as agent for all of the shareholders, refused to make any distribution to Respondent as the owner of 693 shares, and suit was entered to recover Respondent's distributive share of the fund in the hands of the Petitioner for distribution in the sum of $8,189.76, together with the difference between the amount which the Petitioner realized on account of the sale of the assets obtained from Respondent and the assessment liability of the Respondent (R. 5a, 26a).

The complaint in this case was filed upon the equitable principle that a shareholder whose assets were paid into a fund which is now to be repaid to the shareholders under Section 2 of the Act of June 30, 1876, c. 156, sec. 3, 19 Stat. 63, as amended (12 U.S.C.A. sec.

197) should be entitled to participate in that fund in direct proportion to the amount that the fund was enriched by the assets paid in by the shareholder. Section *Second* of the Act requires the shareholders' agent:

> "To repay any amount or amounts which have been paid in by any shareholder or shareholders of such association upon and by reason of any and all assessments made upon the stock of such association by the order of the Comptroller of the Currency in accordance with the provisions of the statutes of the United States."

Notwithstanding the market value of the assets on the day that they were turned over to the Receiver for the bank, it was an actual fact that the Receiver in liquidating the assets some three years after their receipt obtained $42,783.35 which was $7,128.50 more than Respondent's assessment, with interest to the date upon which the securities were turned over to the Receiver. Nevertheless shareholders' agent claimed the right, in making distribution of this fund, to credit Respondent with only $30,159.58, the market value of the securities on the day they were turned over to the Receiver. The shareholders' agent did not receive from the Receiver $30,159.58; he received $42,783.35, and it was this latter amount which he was distributing to the shareholders.

Suit was entered by the Respondent upon the theory that the stockholders' assessments created a fund. This fund was more than sufficient to pay the expenses and claims of the bank and was in the hands of the stockholders' agent for distribution by that agent among the stockholders who created the fund. The stockholders' agent is required, by statute, to "repay any amount or amounts which have been paid in by any shareholder

or shareholders of such association upon and by reason of any and all assessments made upon the stock of such association." The amount paid into the fund which the agent had, and which was turned over to him by the Receiver of the bank, was $42,783.35. In other words, there was in this fund $7,128.50 more than the full amount of Respondent's assessment, with interest to May 16, 1932.

Petitioner filed a motion to dismiss the complaint as amended, (R. 28a), which motion was denied by the District Court of the United States for the Western District of Pennsylvania on February 23, 1948 (R. 45a). An answer was filed by Petitioner (R. 48a), and Respondent filed a motion under Rule 12 (C) of the Federal Rules of Procedure for judgment on the pleadings (R. 53a). After argument upon said motion, the District Court entered judgment in favor of the Respondent and against the Petitioner (R. 59a). An appeal was taken by Petitioner to the United States Court of Appeals for the Third Circuit which Court, after argument before Judges Goodrich, McLaughlin and O'Connell on November 19, 1948, and reargument before the entire Court on March 21, 1949, affirmed the judgment of the District Court (R. 90), Judge O'Connell dissenting.

The case is now before this Court upon Petitioner's Petition for a Writ of Certiorari to the United States Court of Appeals for the Third Circuit.

SUMMARY OF ARGUMENT

I. A stockholder in an insolvent bank is entitled to recover from the agent for all of the stockholders to the extent that the stockholder contributes, directly or indirectly, to the fund being distributed by the agent among the stockholders who created it. The stockholder will be considered to have paid his assessment to the extent of his contribution to the fund even though the actual determination of the amount of his contribution cannot be made until a subsequent time.

II. The Receiver had no authority to sell the securities until he had been authorized to do so by the Comptroller of the Currency and upon order of a Court of record of competent jurisdiction. Since the Receiver did not secure that authority and the permission of the Court until February 13th, 1935, the stocks, bonds, and mortgages should be valued as of that date in determining the amount to be repaid the stockholders by the agent for the stockholders, inasmuch as the agent actually has in cash for distribution the amount which he received from the Receiver, who sold the securities at the values they had on the day the Court authorized him to do so.

III. The decision of the United States Court of Appeals for the Third Circuit follows the instructions of the Comptroller of the Currency to National Bank Receivers.

ARGUMENT

I.

Counsel for both parties are in full agreement that the fund must be distributed by the Petitioner, as stockholders' agent, in accordance with the Act of Congress, approved June 30, 1876, c. 156 sec. 3, 19 Stat. 63, as amended, (12 U.S.C.A. sec. 197) which provides *inter alia* that a shareholders' agent, winding up the business of a national banking association, shall distribute the proceeds of the assets or property of the association as follows:

> "First. To pay the expenses of the execution of the trust to the date of such payment;
>
> "Second. To repay any amount or amounts which have been paid in by any shareholder or shareholders of such association upon and by reason of any and all assessments made upon the stock of such association by the order of the Comptroller of the Currency in accordance with the provisions of the statutes of the United States; and
>
> "Third. The balance ratably among such stockholders, in proportion to the number of shares held and owned by each. Such distribution shall be made from time to time as the proceeds shall be received and as shall be deemed advisable by the said Comptroller or said agent."

The only controversy between counsel exists in the application of this statute.

The statute has been construed by the Circuit Court of Appeals for the Seventh Circuit in *In Re First Na-*

tional Bank of Arthur, Ill., 100 F. 2d 623 (1938). In that case the Court held that a stockholder who had made a one hundred percent payment on his assessment should, to the extent that his percentage exceeded the percentage of his fellow stockholders, be first repaid. The Court said at Page 624:

> "* * * in the absence of a statute requiring a different distribution, it would seem just and equitable that the stockholder who made a one hundred percent payment on his assessment should, to the extent that his percentage exceeded the percentage of his fellow stockholders, be first repaid. Without such full payment by him there would be no fund to distribute."

It is obvious that under the decision in this case the determination of the shareholder's percentage of payment on account of his assessment liability is the important factor. If the payment is in cash, there is no trouble in ascertaining that percentage. But where, in cases like the one at bar, the shareholder pays the assessment, not in cash, but in stocks, bonds and mortgages, which are listed at their market value when they are transferred to the Receiver, but which, when sold, bring more or less than the shareholder's assessment liability, these questions are raised:

(a) What is the shareholder's percentage of contribution when the assets realize less than the assessment liability?

(b) What is the shareholder's percentage of contribution when the assets realize more than the assessment liability?

And the further question to be answered in the latter situation is—

(c) What is to be done with the excess amount realized over the assessment liability?

The District Court of the United States for the Eastern District of Illinois has been faced with this situation. In *First National Bank of Hoopeston, Illinois,* 23 Fed. Supp. 436 (1938), the shareholder turned over real estate which had cost the shareholder approximately $20,000.00, in full settlement of his liability to the bank. Subsequently, the Receiver sold this real estate for $5,600.00 with Court approval. The Court held, in advising the shareholder's agent how the fund should be distributed, that since the shareholder's contribution to the fund was in fact only $5,600.00, distribution must be made on that basis.

It is respectfully submitted that the decision in that case is correct and that by applying the law of that case to the converse situation in the case at bar, the determining factor is *the stockholder's contribution to the fund,* which, in our case, was $7,128.50 in excess of the assessment. If the securities in the case at bar had been sold by the Receiver for only $5,600.00, then Respondent's contribution to the fund would have been *less* than the assessment, and he would be entitled to participate in the fund only to the extent that the agent was in funds from the sale of his assets. If this is true, is it not equally true that where the securities bring *more* than the assessment, the stockholder should be credited with the profit?

It should be noticed that in the Hoppeston case, as in this, the settlement was a settlement in kind; a delivery of property in satisfaction of a fixed indebtedness.

The situation in the Hoopeston case sustains the theory that *to the extent that the stockholder contributes to the general fund, directly or indirectly, to that extent will he be considered to have paid his assessment even though an actual determination of the amount of his contribution cannot be made until a subsequent time.*

Therefore, as among stockholders (which is all we are interested in) a profit made in the disposition of property transferred by a stockholder in satisfaction of his indebtedness should be held as part of a fund in which the stockholder may participate; and not as part of a fund from which he will be excluded. Were it not for the profit from his contributed securities, the fund to be distributed would certainly not have been as great or as large as it is.

Suppose, for example, the fund were large enough to pay all the stockholders the amount of their assessments in full and there was still a balance of $7,128.50 in the fund. Would it not be more equitable to return this to the Respondent stockholder whose securities created it, rather than to divide it among all of the stockholders to the exclusion of the Respondent?

The theory upon which the Respondent is proceeding in the case at bar is not that an assessment liability is considered to be paid in full merely because of the use of the words "in full satisfaction of the claim," or "in full settlement of," or words of like import, in the compromise or settlement of a shareholder's assessment liability. On the contrary, Respondent contends that where assets transferred to a Receiver increase in value to more than the original assessment liability, plus

interest, the Receiver's account and the contributing shareholders have benefited to such an extent that the contributing shareholder is considered to have paid his assessment in full and is entitled to one hundred percent in the distribution of the fund, as well as to the return of the profit.

Who is entitled to the excess of the amount realized on the sale of these assets over and above the shareholder's liability?

The whole purpose of the Receiver, in making his assessment on the holder of national bank stock, is to create a fund to be used in satisfying the claims of creditors and depositors. It is only after these claims have been paid in full, with accumulated interest, that the contributing shareholders are entitled to repayment. The equities arising relate only to the rights of the contributors themselves. The cases have decided that payments should first be made to those shareholders whose percentages of payment of their assessment exceed the payment made by other contributing shareholders in the amount of such excess. See *In Re First National Bank of Arthur, Ill., supra; Russell v Levi,* 286 Ky. 51, 149 S. W. 2d. 734 (1941).

The important consideration, where there has been a compromise and settlement of a shareholder's liability, is the actual cash received on the sale of the assets and not their market value at the time of the transfer to the Receiver. In the present case, the Fidelity Trust Company, Trustee under the Will of John A. Harper, turned over assets, pursuant to an Orphns' Court Decree, having a market value of $30,159.58 as of May 13, 1932,

in compromise and settlement of a principal liability of $34,650.00, plus interest of $1,004.85, or a total liability of $35,654.85.

Since the interest, charged against an assessment liability, is in the nature of a penalty to insure prompt payment, once the liability is paid in full, whether in cash or by the transfer of assets which are liquidated to the amount of that liability, then interest should cease. Therefore, in the present case, the Respondent's liability was $35,654.85. As the Receiver of the bank stands to realize more than this amount on the sale of the assets, the Respondent has made more than a one hundred percent contribution. As of August, 1946, the sale of the assets of the John A. Harper Estate had brought in $42,783.35. Accordingly, the Respondent has contributed to the shareholders' fund a total of $7,128.50 more than its assessment, plus interest to May 16, 1932. This is approximately a 119.9 percent. contribution.

Counsel has not contended that the Respondent would be entitled to the excess or profit made upon the sale of its securities as against the creditors or depositors but only as against the other contributing shareholders. Any other conclusion would result in the Respondent's excess contribution being distributed to other shareholders and would give them a greater percentage of credit on their original assessment than they had made. This would obviously be an inequitable result.

Again to illustrate: Suppose, after paying all of the claims of creditors and depositors, together with accumulated interest and the expenses of receivership,

there were sufficient funds to repay the contributing shareholders in full and have the amount of the Respondent's excess contribution left over. To divide this excess among all contributing shareholders would confer a benefit upon them which they do not deserve and work a detriment to the Respondent which it should not suffer. Such result would be inequitable. Yet, if the Respondent in the present case is considered, as counsel for the Petitioner contends, to have made only an eighty-five percent. payment of its assessment liability (which eighty-five percent payment is based upon the market value of the assets turned over to the Receiver on the date of their delivery and not on the day when the settlement was approved by the District Court or on the day they were sold), then the increase in the value of the assets would inure to the benefit of the other contributing shareholders at the Respondent's expense. This result should not be permitted by any court of equity.

II.

Counsel for Respondent argued the case before the Court below upon two theories: *First,* that the Respondent stockholder was entitled to participate in the fund in proportion to which its assets contributed to that fund, as set forth in Argument I; and *second,* that the Receiver had no authority to sell the securities until he had been authorized to do so by the Comptroller of the Currency and upon order of a court of record of competent jurisdiction; and that since he had not secured that authority and the permission of the court until February 13, 1935, the stocks, bonds, mortgages and cash should be valued as of that day. Since their value on

that day was $42,783.35, (which was $7,128.50 in excess of Respondent's liability, with interest to the day the securities were turned over to the Receiver), Respondent should be entitled to recover not only the distributions already made, and to which it would be entitled on the basis that it had paid its assessment in full, but also the excess amount between the value of the securities on the day the Receiver was authorized by the District Court to accept them in compromise and settlement, and the amount of the stockholder's liability, which was $7,128.50.

The lower Court, in deciding the case, adopted Respondent's second theory. Counsel for Petitioner, in his Petition wholly ignores Respondent's first theory and urges this Court to grant a writ of certiorari because he contends that the Court was in error in stating that the approval of the Comptroller of the Currency and of a court of record was necessary for the sale of the securities by the Receiver.

Counsel for Petitioner argues that approval of a court of record is necessary only in the case of a compromise; that to accept the stocks, bonds, mortgages and cash which the Respondent offered "in full settlement" of its stockholder's liability was not a "compromise"; and that, therefore, no Court approval was necessary. Hence he contends that title to the stocks, bonds, mortgages and cash passed to the Receiver on May 16, 1932 and with that the matter ended. In such case, he submits, all the Respondent is entitled to, is to be credited with the market value of the securities on the date of their delivery.

It is respectfully submitted that the authority of a Receiver to deal with a stockholder with reference to his assessment arises out of the Act of Congress of February 25, 1930, c. 58, 46 Stat. 74 (12 U.S.C.A. Sec. 67) which reads as follows:

> "Any receiver of a national banking association is authorized, with the approval of the Comptroller of the Currency and upon the order of a court of record of competent jurisdiction, to compromise, either before or after judgment, the individual liability of any shareholder of such association."

It is submitted that when the Congress used the words "to compromise, *either before or after judgment,*" it meant to do exactly what the Receiver did in the case at bar. To accept property with a market value of less than the amount of a fixed assessment in full settlement of that assessment is a greater power than the power to compromise a disputed claim. Certainly the Congress did not intend that a Receiver should have the power to *settle* a stockholder's liability for an amount less than the assessment, without the approval of the Comptroller of the Currency and without an order of a court of record of competent jurisdiction, but did intend that the Receiver must have the approval of the Comptroller and an order of court to *compromise* a disputed claim. In other words, when Congress used the words "to compromise either before or *after judgment*" it meant to use the word "compromise" in a broad sense to include the "settlement" of liquidated claims as well as the "compromise" of doubtful claims, since a shareholder's liability is certainly liquidated when it has been reduced to judgment.

Settlement is sometimes used as synonymous with compromise (11 Am. Jur. sec. 2, Page 247) and it is

certainly in this sense that Congress used the word compromise in the statute above referred to.

In *Goess v. A. D. H. Holding Corporation, et al,* 85 F. (2d) 72, (1936) it was contended by the defendant that since the plaintiff, who was the Receiver of an insolvent national bank, had compromised the assessment liability of some shareholders for less than $100.00 per share, the defendant's liability must be limited to the percentage of the lowest of such compromises. The decision has no bearing upon the case at bar except that it shows that the Court regards the words "to compromise the individual liability of any shareholder" as meaning the settlement of a claim for something less than its full amount. The Court said at Page 73:

> "But even if, as may be assumed, the law still requires the assessment to be spread equally and ratably upon all shareholers, there is express statutory authority for the receiver, with the approval of the Comptroller of the Currency and upon court order, *to compromise the individual liability of any shareholder.*" (Italics supplied)

An examination of the Record (Page 21a) shows that on December 28, 1934, the Receiver wrote a letter of recommendation to the Comptroller of the Currency; that a letter of approval was received January 7, 1935; and an Order of Court obtained on February 13, 1935. None of these memoranda are printed in the Record. It is interesting to note, however, that the Petition of the Receiver, filed in the District Court of the United States for the Western District of Pennsylvania at No. 2589 in Equity, states that it is a "Petition for Leave to Compromise and Settle Assets." The Order of Court at the same number and term, dated February 13, 1935,

is likewise entitled "Order for Leave to Compromise and Settle Assets."

Attached to the Receiver's Petition, at No. 2589 in Equity, in the District Court of the United States for the Western District of Pennsylvania, as Exhibit D, is the Comptroller's letter of authority, dated January 7, 1935. This letter reads in part, "You are authorized to petition the Court for an Order permitting you to accept the securities delivered to your trust in settlement of your bank's claim in full settlement of the stock assessment liability of the J. A. Harper Estate in the amount of $34,650.00."

Certainly this Court can come to no other conclusion than that reached by the lower court, namely, that it was necessary for the Receiver of the Bank of Pittsburgh to obtain the permission of the Comptroller of the Currency, and an Order of the District Court of the United States for the Western District of Pennsylvania, to enter into the arrangement which it did with the Trustee of the Estate of John A. Harper, Deceased. To reach any other conclusion would be to open the door to opportunities for fraud not intended by the Congress of the United States.

III.

Section 5 of Chapter VI of the "Instructions to National Bank Receivers," issued by the Comptroller of the Currency, reads as follows:

> "Only bad or doubtful debts may be compromised and even in those instances the approval of the comptroller and the authority of an order of a court of record of competent jurisdiction are *first necessary*.

> "In many instances debtors of your trust will come in before the maturity of their obligation and offer to pay the face of their debts with interest to that day, provided the remainder of interest is rebated to them. Unless the obligation reads 'payable on or before' or is payable on demand such a rebate could not be allowed except as a compromise. In that case the obligation would have to be a bad or doubtful debt and the consent of the comptroller and the authority of a court order *first obtained* before the allowance of the rebate." (Italics supplied)

Again the Comptroller states: "If the proposition is approved by the Comptroller and authorized by a court of competent jurisdiction, the compromise *may be effected.*" (Italics supplied)

Certainly the Comptroller, in his Instructions to National Bank Receivers, has no doubt that there is not an effective compromise until he has approved it and an order of a court of competent jurisdiction obtained authorizing it. It is inconceivable that the Comptroller should be considered bound by the terms of the compromise before the conditions precedent have been met and it is unconscionable that the order of a court of competent jurisdiction should have the effect of retroactively binding the other party to the compromise at a time when the Comptroller himself is not bound.

It is well established that the construction of a statute by those charged with its execution, particularly high executive officers, is entitled to great weight and consideration. At Key Number 219, entitled "Executive Construction," of Volume 59 Federal Digest, at Page 533,

there are twenty-six columns of cases listed supporting this principle of law. Certainly the directions of the Comptroller of the Currency to National Bank Receivers specifically stating that before a compromise may be made, the Receiver must obtain the approval of the Comptroller and the authority of an order of a court of record of competent jurisdiction must be given great weight and consideration by the Court in determining the day upon which the compromise between the representatives of the Harper Estate and the Receiver became effective. And under his instructions it could not have been effective until the conditions precedent had been performed. That date was February 13th, 1935. This was the conclusion reached by the Court of Appeals for the Third Circuit.

Conclusion

It is respectfully submitted that the Petition is without sound basis, and should be denied.

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